No. 86-1967

Supreme Court, U.S.
FILED
AUG 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM P. TAVOULAREAS,

Petitioner,

v.

THE WASHINGTON POST COMPANY,

and

PATRICK TYLER,

Respondents.

WILLIAM P. TAVOULAREAS,

Petitioner,

v.

PHILIP PIRO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY MEMORANDUM

Of Counsel:

CHARLES ALAN WRIGHT
727 East 26th Street
Austin, Texas 78705
(512) 471-5151

HENRY PAUL MONAGHAN
435 West 116th Street
New York, New York 10027
(212)280-2644

JOHN J. WALSH
100 Maiden Lane
New York, New York 10038
(212) 504-6000
Counsel of Record for Petitioner

EDWIN DAVID ROBERTSON
TERRENCE J. CONNOLLY
BARBARA A. SOLOMON

CADWALADER, WICKERSHAM
& TAFT
100 Maiden Lane
New York, New York 10038
Counsel for Petitioner
William P. Tavoulareas

August 13, 1987

TABLE OF CONTENTS

		PAGE
Table of Authorities		i
I.	The Court of Appeals Acted On the Basis of Unarticulated Legal Principles	2
II.	The Decision Below Will Eviscerate the Role of the Jury in Libel Cases	5
III.	This Court Should Review the Lower Court's Application of An Unjustifiable Most Restrictive Meaning Rule	7
Conclusion		9

TABLE OF AUTHORITIES

Cases

Anderson v. City of Bessemer, 470 U.S. 564 (1985) 2

Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505 (1986) .. 5

Bartimo v. Horsemen's Benevolent and Protective Association, 771 F.2d 894 (5th Cir. 1985), *cert. denied,* 106 S.Ct. 1635 (1986) 7

Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984) 5

Connick v. Myers, 461 U.S. 138 (1983) 4

Fare v. Michael C., 442 U.S. 707 (1979) 4

McCoy v. Hearst Corporation, 42 Cal. 3d 835, 727 P.2d 711, 231 Cal. Rptr. 518 (1986), *cert. denied,* 107 S.Ct. 1983 (1987) 7

Oregon v. Hass, 420 U.S. 714 (1975) 4

Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 106 S.Ct. 1558 (1986) 4

Rosenblatt v. Baer, 383 U.S. 75 (1966) 4

Tavoulareas v. The Washington Post Co., 817 F.2d 762 (D.C. Cir. 1987) 3

Other Authorities

Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229 (1985) 4

5A Moore and Lucas, *Moore's Federal Practice* (1986) .. 5

No. 86-1967

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM P. TAVOULAREAS,

Petitioner,

v.

THE WASHINGTON POST COMPANY,

and

PATRICK TYLER,

Respondents.

WILLIAM P. TAVOULAREAS,

Petitioner,

v.

PHILIP PIRO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY MEMORANDUM

Respondents contend that the Petition for Certiorari presents only a "fact-specific" dispute, inappropriate for review by this Court. Respondents' basic premise is that because "[c]ourts and litigants in the future . . . will be guided by what the court of appeals said," not what it *did,* this case is inappropriate for Su-

preme Court review. Brief in Opposition to Petition ("Opp. Br.") at 8, n.5. In other words, even though the court of appeals quite discernibly conducted a *de novo* re-finding of the facts, the majority's disclaimers to the contrary are conclusive. According to respondents, if, as petitioner claims, the court of appeals applied rules that were "not articulated anywhere in the Court's opinion," its opinion will have no impact on American jurisprudence. Opp. Br. at 9. Respondents are wrong. What matters is the substance of the lower court's opinion, not its form. *See, e.g., Anderson v. City of Bessemer,* 470 U.S. 564, 576 (1985) ("[T]he Fourth Circuit improperly conducted *what amounted to* a *de novo* weighing of the evidence in the record") (emphasis added). Subsequent court decisions will be affected by what the court of appeals did, not only what it said.

Although striving to appear as only a fact-dependent application of uncontroversial legal principles, the court of appeals' decision in fact altered the accommodation between free speech and protection of reputation that this Court has fashioned. Because the court's opinion effectively eviscerates the role of the jury in libel cases and because it was grounded on an unjustified most restrictive reading of the article, this Court should grant certiorari.

I. The Court of Appeals Acted On the Basis of Unarticulated Legal Principles

Respondents criticize petitioner's arguments addressed to the opinion's substance as "frivolous" and a "figment of [his] imagination." Opp. Br. at 7. But petitioner was not the first to discern that the *en banc* majority had acted on the basis of unarticulated legal standards. Chief Judge Wald, concurring in the judgment, squarely presented this view of the majority's analysis:

> The majority purports to apply the traditional standard for overturning a jury verdict . . . Nonetheless, throughout its opinion it scrutinizes the inferences drawn from the evidence of actual malice far more rigorously than

> that ordinary judgment n.o.v. standard would permit . . . .
>
> Because I believe that this highly publicized and controversial case should be reviewed according to an *articulated standard that comports with what the court actually does*, I will set out the standard I think should apply here. . .

Tavoulareas v. The Washington Post Company, 817 F.2d 762, 804 (D.C. Cir. 1987), A283 (emphasis added).

Senior Judge MacKinnon, in dissent, found the same fundamental flaw in the majority opinion:

> After asserting that its review of the evidence in this case is made under "traditional j.n.o.v. standards," the majority discards those traditional standards and proceeds to make its own assessment of witness credibility and to disregard controlling reasonable inferences in favor of the verdict.

817 F.2d at 810, A296-97 (footnote omitted).

Thus, despite the disclaimers of the majority on which respondents choose to stand (Opp. Br. at 5-10), two other participants in the court's deliberations saw the obvious. The majority simply retried this case based on a cold paper record and its unduly restrictive reading of the November 30th article. Reading this *en banc* opinion from an influential federal circuit, other courts undoubtedly will feel free in other libel cases to do just what the court below did here: dissect the evidence and apply the court's own judgment about what is the most plausible inference, who is the most credible witness, and what is the most innocuous reading of an article. No reader of the court of appeals opinion could draw any conclusion other than that an appellate court is free simply to reweigh each item of evidence on *every* issue as if the jury did not exist, and as if *the court* were the finder of fact. Disclaimers cannot alter that reality; the improper *de novo* review is there for all to see. Indeed, the unmistakable precedent for activist appellate review is made all the more mischievous by

the majority's disclaimers. As Chief Judge Wald noted, the "majority's refusal to admit it is applying *Bose's* special independent review standard here will confuse the law for all judgments n.o.v., not just libel cases." 817 F.2d at 804, A284.[1]

Virtually every term of this Court bears witness to this Court's proper role in insuring that constitutional rights are fully vindicated but not inflated. *E.g., Oregon v. Hass,* 420 U.S. 714, 719 (1975); *Fare v. Michael C.,* 442 U.S. 707, 716-717 (1979). The first amendment presents no exception. *E.g., Connick v. Myers,* 461 U.S. 138, 147-149 (1983).

This petition falls squarely within this principle. This Court's prior decisions reflect an effort to accommodate important societal interests of free speech with the individual's right to the protection of his good name. *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 106 S.Ct. 1558, 1562 (1986).[2] Review is particularly appropriate here because the reconciliation of freedom of speech with protection of reputation necessarily has proceeded on a case-by-case basis. Monaghan, *Constitutional Fact Review,* 85 Colum. L. Rev. 229, 273-75 (1985). Examination of this record will disclose that the *en banc* majority seriously undermined the important societal interest in protecting reputation. In substance and effect the court of appeals erroneously enlarged the scope of protection afforded by the first amendment by rejecting the jury's proper findings and by applying a most restrictive meaning rule to the defamatory article.

---

[1] Earlier in this case respondents argued that what a court of appeals actually did is far more important for purposes of setting precedent than what it said. In their suggestion for rehearing *en banc,* respondents argued that the panel majority opinion had "effectively redefine[d] actual malice" in a way that would "fundamentally change how libel cases in this Circuit are tried and decided, and how the news in the nation's capital is reported." Petition for Rehearing and Suggestion for Rehearing *En Banc* at 2, 1. However, the panel majority had not purported to do any such thing. Respondents, of course, presented their view of the opinion's substance, not its form.

[2] The latter concept simply reflects "the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty" (*Rosenblatt v. Baer,* 383 U.S. 75, 92 (1966) (Justice Stewart, concurring)).

II. The Decision Below Will Eviscerate the Role of the Jury in Libel Cases

While the first amendment mandates rigorous scrutiny of the record as to actual malice, the *en banc* majority, claiming to honor that principle (817 F.2d at 789 n.37, A249), went far beyond any review requirement compelled by the first amendment. The effect of its decision is to eviscerate the seventh amendment in libel cases. (Petition at 21-25). Respondents argue that "the court of appeals did not *announce* any new or controversial rule of independent review." (Opp. Br. at 12) (emphasis added). That response is far wide of the mark. As Chief Judge Wald recognized, it was only by rejecting permissible inferences, a method of review she found required by this Court's decision in *Bose Corporation v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), that the jury verdict could be overturned: "I do not think an ordinary judgment n.o.v. standard, or even the pre-*Bose* independent review standard the majority claims to apply, would permit us to overturn the verdict . . . ." 817 F.2d at 804, A283 (footnote omitted).

But *Bose* does not require or condone the type of review the majority in fact conducted and Judge Wald would conduct openly. The court's rejection of proper jury findings is wholly inconsistent with this Court's decision in *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2513 (1986), where this Court said "[c]redibility determinations, the weighing of the evidence, and the *drawing of legitimate inferences from the facts are jury functions, not those of a judge* . . . ." (Emphasis added.) *Anderson* proclaimed no new doctrine. Accordingly, in displacing the jury's findings on actual malice—and more astoundingly on truth, an area where no basis whatever exists for doubting the jury's capacity to make such a determination—the court of appeals established a process of review wholly at odds with the seventh amendment.[3]

---

[3] Respondent's statement that "[i]t has long been settled that a court's grant of j.n.o.v. does not violate a party's Seventh Amendment rights" (Opp. Br. at 13, n. 9) simply begs the question of what standard is applied in awarding j.n.o.v. The constitutionality of j.n.o.v. is dependent upon strict adherence to a review that views the evidence and all reasonable inferences in the light most favorable to the prevailing party. *See generally* 5A Moore and Lucas, *Moore's Federal Practice* (1986) ¶¶ 50.07[1] and [2].

Respondents seek to justify the court's interference with the jury's determination of falsity by referring in detail to so-called "undisputed" evidence of petitioner's "personal" involvement in several matters: in recruiting Comnas, in the Samarco-Atlas arrangements, in the events leading to Comnas' resignation from Atlas, etc. These facts, respondents insist, indisputedly confirm the truth of the nepotism alleged. Opp. Br. at 19-20. Simply put, from selected items of primary evidence (testimony and documents), respondents proffer an inference: that petitioner had used the occasions of his personal involvement to aid his son.

But even a casual review of the evidence shows that the jury was not obliged to accept that inference. Petitioner explained to the jury the full circumstances of each of the facts relied upon by respondents. Moreover, through both his own testimony and that of other Mobil witnesses, petitioner gave the jury the opportunity to draw a quite different inference: that petitioner's "personal involvement" was no more and no less than the activity of a responsible chief operating officer of Mobil Corporation who acted in *Mobil*'s interests. Quite plainly, the jury had the choice. Under the evidence and instructions, the jury could have found "nepotism", or it could have found that petitioner acted for Mobil. From the verdict, the jury's choice is unmistakable.

Petitioner's "personal" contacts with Mobil activities related to Samarco and Atlas were explained to the satisfaction of the jury. The court of appeals was bound by the inferences reasonably supportive of the jury verdict. There is no first amendment license permitting an appellate court far removed from the trial to find otherwise by a very selective review of the evidence. But the court clearly believed otherwise. It simply ignored the totality of the evidence of falsity and the findings the jury reasonably made in petitioner's favor. This is contrary to traditional law—law rooted in the seventh amendment—and cannot stand.[4]

Even accepting the court's truth/falsity determinations at face value, the court below found that the charge that petitioner "per-

---

[4] Whatever *Bose* means (*see* Petition at 21-24), it has not changed the way the issue of truth-falsity is reviewed.

sonally urged" that his son be made a partner in Atlas was false and defamatory. But the court found that respondents had not published that statement with actual malice. 817 F.2d at 788, A247. Because it applied the wrong standard of review on the malice issue, this point alone is sufficient to warrant reversal and require a reinstatement of the jury's verdict.[5]

III. This Court Should Review the Lower Court's Application of An Unjustifiable Most Restrictive Meaning Rule

Another illustration of the court's *de facto* realignment of the first amendment-reputation balance this Court has created, is its application of an unjustified most restrictive meaning rule. Respondents mistakenly argue that only the December 1 article, not the November 30 article, charged misuse of assets. Opp. Br. at 18, n.15, and accompanying text. In large measure, respondents simply repeat and endorse the lower court's treatment of this issue. But this argument rests upon a misapprehension of the evidence. As noted (Petition at 18, n.13), petitioner tried his case on *both* articles on the theory he was charged with, among other things, misuse of corporate assets. (*See, e.g.*, Tr. 99, 4349-60, 4372-75.) Moreover, at petitioner's request the jury was explicitly charged that it could find that the defamatory sting of *both* articles included misuse of assets and breach of fiduciary duty. A315. While the December 1 article contained an explicit charge that petitioner had misused assets, the November 30 article clear-

---

[5] Respondents argue (Opp. Br. at 12, n.7) that this Court should await a case where the tension between this Court's decisions in *Bose* and *Anderson* is "squarely presented." But this petition and the decision below clearly present this crucial issue. As Chief Judge Wald warned: "the majority's refusal to admit it is applying *Bose*'s special independent review standard here will confuse the law for all judgments n.o.v., not just libel cases." 817 F.2d at 804, A284. The dual mandates of *Bose* and *Anderson* must be reconciled. The apparent conflict between these cases has been a consistent source of confusion and one of enormous practical importance to the functioning of the judicial system. *See, e.g., McCoy v. Hearst Corp.*, 42 Cal. 3d 835, 727 P.2d 711, 718, 231 Cal. Rptr. 518 (1986) (In Bank), *cert. denied*, 107 S.Ct. 1983 (1987); *Bartimo v. Horsemen's Benevolent and Protective Ass'n*, 771 F.2d 894, 898 (5th Cir. 1985), *cert. denied*, 106 S.Ct. 1635 (1986).